Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/02460/2015

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 29 February 2016	**On 8 April 2016**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS ELISANGELA LARSON NETO

Respondent

Representation:

For the Appellant: Ms N Willcocks-Briscoe, Senior Home Office Presenting Officer
For the Respondent: Mr R Jesurum, Counsel, instructed by Morgan Pearse Solicitors

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited

me to make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant (hereafter the Secretary of State) appeals against the decision of the First-tier Tribunal (Judge Bradshaw) allowing the respondent's appeal against a decision taken on 25 November 2014 to refuse the respondent's application for a resident card under regulation 18 of the Immigration (European Economic Area) Regulations 2006 ("the Regulations").

Introduction

3. The respondent is a citizen of Brazil born on 29 March 1975. She entered the UK as a visitor on 15 June 2005. She has a son, Y, born in 2007. His father is a citizen of Portugal born in 1968 ("the father"). The respondent failed to leave the UK when her visa expired but later made several applications to regularise her stay. The respondent has never lived with the father and Y lives with her. He sees the father almost every day, stays some weekends and the father provides monthly child support.

4. The Secretary of State accepted the respondent's identity and nationality but concluded that the father was not a worker. He was self-employed as the director of Vale Victoria Limited.

The Appeal

5. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Hatton Cross on 28 July 2015. She was represented by Ms Gunamal, Counsel. The First-tier Tribunal found that the father was an employee of Vale Victoria Limited and was therefore a worker for the purposes of the Regulations. If the respondent were to be removed from the UK then Y would leave with her. The respondent was adamant that he would not be left with the father. The father suggested that he would apply to the courts to stop Y from leaving the UK. If the respondent was required to leave the UK then Y, being in her sole custody and she being his primary carer, would be unable to continue to be educated in the UK. The appeal was allowed under the Regulations.

The Appeal to the Upper Tribunal

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law by failing to have regard to the requirement in regulation 15A(4A)(c) that Y would be **unable** to reside in the UK or another EEA state if the respondent were required to leave. The respondent had not demonstrated that Y would be compelled to leave the UK if the respondent was required to leave. The Secretary of State relied upon paragraph 41 of MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 380. There also was no evidence that the

father was unable to assume caring responsibilities – disinclination or reluctance did not reach the threshold set out in the Regulations.

7. Permission to appeal was granted by First-tier Tribunal Judge Nicholson on 31 December 2015 on the basis that the issue was not what would happen in practice but whether the child would actually be unable to remain in education in the UK. It was arguable that the judge had applied the wrong test.

8. Thus, the appeal came before me

Discussion

9. Ms Willcocks-Briscoe submitted that the issue was the judge's approach and the basis upon which the appeal was allowed. Paragraph 17 of the decision asserts that the minor EEA child would have to leave with the respondent but the judge did not engage sufficiently with the issue. The judge had to consider whether the child could be cared for by the father. The judge did not consider the relevant authorities and the further bundle submitted on 23 February 2016 was not before the judge.

10. Mr Jesurum submitted that Zambrano rests on Article 20 and is about the rights of the child. Looking at paragraph 17 of the decision, there was a finding that Y would be unable to be educated in the UK. The child would lose the benefits of his right to EU citizenship if the respondent is removed from the UK. The issue is whether the father **would** or **could** care for Y in the UK. Paragraph 77 of SSHD v AQ and others [2015] EWCA Civ 250 points towards "would". The fact that the father could look after the child is not a reason to set aside the judge's decision.

11. I accept that the key paragraphs of the decision are 10 and 17. At paragraph 10, the judge found that Y had never lived with the father and had only stayed with the father on some weekends. At paragraph 17, if the respondent were to be removed then Y would leave with her. He would therefore be unable to continue to be educated in the UK. It is common ground that the judge did not consider whether the father could care for Y, enabling him to remain in education in the UK.

12. I have considered MA and SM. At paragraph 41, the Upper Tribunal cited Jamil Sanneh [2013] EWHC 793 in which Hickinbottom J held that even where a non-EU ascendant relative is compelled to leave EU territory, the article 20 rights of the EU child will not be infringed if there is another ascendant relative who has the right of residence in the EU, and who can and will in practice care for the child. It is for the national courts to determine as a question of fact on the evidence before, whether an EU citizen would be compelled to leave the EU to follow a non-EU national upon whom he is dependent. In this appeal, the judge found as a fact that if the respondent left the UK then Y would leave with her. That finding closes the door on any suggestion that the father would **in practice** care for Y, because if he did so then Y would not have to leave the EU.

13. Further support for Mr Jesurum's submissions can be found in AQ. At paragraph 77, the Court of Appeal stated that the domestic tribunal is entitled to examine all of the circumstances provided that the focus is upon the practical effects of deportation. In this appeal, the judge clearly found that the practical effect of deportation of the respondent would be that Y would leave the EU and be unable to continue his education in the UK. That finding was based upon the previous findings of fact in paragraph 10 of the decision – particularly that the father had no history of caring for Y and there was nothing to suggest that he would be willing to take full parental responsibility rather than the current arrangement of regular contact and child support.

14. I am satisfied that Ajinde and Thinjom (Carers – Reg 15A – *Zambrano*) [2015] UKUT 00560 (IAC) does not assist the Secretary of State because that case was about adult dependents rather than children. In this appeal, the judge could have said more about the father's position and willingness to become a sole parental carer in the UK. However, that does not mean that the findings of fact made by the judge are perverse. They are soundly based upon the factual matrix that emerged from the evidence. There is no conflict with established case law.

15. Thus, the First-tier Tribunal's decision to allow the respondent's appeal under the Regulations did not involve the making of an error of law and its decision stands. I have not found it necessary to consider the further bundle of evidence submitted by the respondent's representatives for the Upper Tribunal hearing.

Decision

16. Consequently, I dismiss the appeal of the Secretary of State.

Signed  Date 23 March 2016

Judge Archer

Deputy Judge of the Upper Tribunal